

COPY

IN THE MATTER OF:)
CHERYL A. HOLLIS, and) DOCKET NO. 03-08-291
MELINDA WALKOWIAK,) DOCKET NO. 03-08-294
Grievants,)
)
v.)
)
DEPARTMENT OF HEALTH AND)
SOCIAL SERVICES,)
Agency.)

BEFORE Brenda C. Phillips, Chairperson, John F. Schmutz, and Paul R. Houck, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 *Del. C.* § 5908(a).

APPEARANCES:

For the Grievants:
Roy S. Shields, Esquire
108 East Water Street
P. O. Drawer F
Dover, DE 19903

For the Agency:
Ilona M. Kirshon, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

These two grievance appeals were filed with the Merit Employee Relations Board (“Board”) during August and September of 2003 by Roy S. Shiels, Esquire on behalf of the named individuals after adverse Step Three grievance decisions. *See* Merit Rule No. 21.0130.¹

A common element of the two grievances is the determination by the Department of Health and Human Services (“DHSS” or “Agency”) not to “level up” the Grievants’ salaries based upon an advance salary given to the newly hired Director of Nursing at the Delaware Psychiatric Center (“DPC”). Both Grievants are Registered Nurses employed by DHSS.

¹ The Merit Rules were modified effective January 1, 2004. Reference is made to the former rules as the two grievance appeals are based on those rules and were filed prior to modification of the rules.

Another common concern is the determination by the State Personnel Office to issue a "revised" Step 3 decision after concluding, based upon submissions made solely on behalf of DHSS, that the original Step 3 decision issued was erroneous because the parties had relied upon the "wrong" Merit Rule at the Step 3 hearing. This latter concern was the basis of a "Petition for Instruction on Merit Rule Procedures, and Determination of Jurisdiction" ("Petition") filed by Ms. Hollis' attorney on June 16, 2004.

In the Petition it was alleged, among other things, that the decision of the Step 3 hearing officer was dated July 31, 2003 and that the appeal of Grievant Hollis was filed on August 11, 2003.² The Petition further asserts that on August 28, 2003, 28 days after the date of the initial Step 3 decision and 17 days after the filing of the appeal in the Hollis grievance appeal, the Step 3 hearing officer for the State Personnel Office issued a letter in which she vacated her prior decision and issued a new decision with different results. This Petition was considered by the Board and is the subject of a separate Board Order that was mailed on September 10, 2004. The Board Order denied the Petition and directed the scheduling of a *de novo* evidentiary hearing for Ms. Hollis.

On January 5, 2005, the Agency filed a Motion to Consolidate the above-captioned dockets for hearing. The Board considered this Motion and after deliberations, the Motion was granted on March 23, 2005.

The consolidated evidentiary hearing was conducted on January 25, 2006 and February 2, 2006. This is the Decision and Order of the Board based upon the evidence and arguments presented at the hearing.

RELEVANT MERIT RULES

MERIT RULE NO. 5.0711

The Appointing Authority, may approve a starting rate higher than the minimum for the paygrade up to 80 percent of midpoint where the applicant's qualifications are clearly over and above those required as a minimum by the class specification. The Director may approve a starting rate higher than the 80th percentile provided that such higher rate is requested in writing by the appointing authority and is clearly justified and contains applicable documentation of the applicant's qualifications.

² The appeal of Grievant Hollis was actually received at the Merit Employee Relations Board on August 13, 2003.

MERIT RULE NO. 5.0712

The Appointing Authority may request, and the State Personnel Director may approve, a starting rate higher than the minimum for the paygrade where a critical shortage of applicants exists. The State Personnel Director, in concurrence with the State Budget Director and the Controller General, after specifying all equally qualified incumbents of the same classification within the same geographic area receiving a lower rate, may provide that those employees shall also have their rates increased to the rate established for entrance if their performance is satisfactory.

SUMMARY OF THE EVIDENCE

Renata Henry, after being sworn, testified as a witness for the Agency. She is the Director of the Division of Substance Abuse and Mental Health ("DSAMH"), a Division of DHSS and familiar with the Director of Nursing position at Delaware Psychiatric Center ("DPC"). DPC's nursing director position was posted in 2001 and 2002, and she was part of the decision to consider applicants and hire a person for the position. DPC, which has approximately 294 operating beds and is the largest of 4 budget units, was experiencing staffing and regulatory difficulties when the nursing director position was vacant, and was concluding a year of surveillance from its funding and regulatory agency because of various problems.

Ms. Henry was seeking a Director of Nursing candidate with various skills, including a history of working with psychiatric patients at a 24-hour-day/7-day-a-week institution. The job posting in 2001 (State Exhibit No. A-12 and Grievants' Exhibit No. B-1) set forth minimum qualifications; however, DHSS was looking for the best person with certain qualifications from the pool of minimally-qualified applicants. Ms. Henry did not believe any of the 4 applicants, whose applications were at State Exhibit Nos. A-1 to A-4, demonstrated the qualities or experience she sought for the DPC position.

Ms. Henry testified that DPC serves approximately 4 populations, including a forensic unit for patients from the Delaware Department of Corrections or outpatient admitted by order of a judge for competency evaluation and treatment, and sentenced patients who are found guilty but mentally ill and not in the prison population. DPC receives patients from Governor Bacon Health Center and Stockley Center. Approximately 97% of DPC's population is involuntary commitments.

There was a second posting in 2002 for the DPC nursing director position because no one had been hired. Additionally, an executive head hunting firm conducted a search for this position

(State Exhibit No. A-5). Ms. Henry discussed with the firm various criteria sought for the DPC nursing director position, and the firm suggested a targeted salary of \$80,000-plus would be needed to attract qualified candidates.

The search firm presented two candidates (State Exhibit No. A-6). Ms. Henry found that both candidates met their requirements, and believed the second candidate, Merlyn LaPaix, better suited the Agency's needs because of her qualifications, including that she had worked in an institution larger than DPC. Ms. Henry knew it would be necessary to request an advance salary because salaries in the geographic area where Ms. LaPaix was working were higher and because of Ms. LaPaix' experience and education.

An advance starting salary of \$88,150 was requested for Ms. LaPaix, based upon various reasons including her work at Bergen Regional Medical Center ("Bergen"), which was described as a 323-bed psychiatric facility (State Exhibit No. A-10). The requested salary was approximately 120% of midpoint of the paygrade for Directors of Nursing at the State's facilities (State Exhibit No. A-19). Ms. Henry testified that an advanced salary greater than 85% is justified through a process first at DHSS' Human Resource unit ("HR"), then at the State Personnel Office with approval required at three levels: the Controller General, the Director of Human Resources and the Budget Director. Ms. Henry clarified subsequently that under Merit Rule 5.0711, only the director may approve a starting salary higher than the 80th percentile, based upon justification and documented qualifications.

Ms. Henry believed Ms. LaPaix had extensive inpatient psychiatric experience compared to the other applicants with outpatient psychiatric experience (State Exhibit No. A-6). She opined that the Grievants' backgrounds were not comparable to Ms. LaPaix, as Ms. Henry was looking for psychiatric inpatient experience and saw little or no such experience on the Grievants' resumes (State Exhibit Nos. A-20 and A-21). Ms. LaPaix was hired as DPC's nursing director, but left subsequently.

On cross-examination, Ms. Henry testified she does not have a background in nursing. She has administrative experience and an undergraduate degree in social work and a Masters of Education. Her job duties as DSAMH Director are primarily administrative. The 2001 posting was the first she had been directly involved in recruiting. Ms. Henry testified a memo dated

October 31, 2003 (Grievants' Exhibit No. B-15), was a request for an advanced starting salary for the nursing director at the Delaware Home for Chronically Ill ("DHCI"), based upon Merit Rule 5.0712, as well as a request for leveling up the salary for 4 other nursing directors.

The Appellant, Ms. Melinda Walkowiak, who was sworn, testified she is the Director of Nursing at the Governor Bacon Health Center. She has a Bachelors of Science in nursing with an emphasis in psychiatric nursing, a Masters of Science as a clinical specialist in psychiatric nursing, and training and experience in psychiatric nursing. Governor Bacon is one of 3 State-operated nursing homes. There have been difficulties recruiting for Directors of Nursing at all State facilities. She received an advanced starting salary when selected in 1985. Her experience has been that advanced salaries are necessary to fill nursing director positions. DHSS has six nursing director positions at various State facilities, which have received advanced salaries.

Ms. Walkowiak opined the requirements for the nursing director position at Governor Bacon and Delaware Psychiatric Center are the same. The reclassification in 2002 collapsed 3 levels of nursing director into one level at paygrade 21 and as a result, she received a 5% promotion from paygrade 19 to 21. Ms. Walkowiak testified nursing director salaries were leveled up in 2003 to an amount of \$70,000. Her current salary is \$80,000 annually.

On cross-examination, Ms. Walkowiak testified Governor Bacon, when compared to DPC, has 94 operating beds with a primarily geriatric population and does not have criminally insane patients. She received salary increases in 2002 as a result of the reclassification and in 2003 as a result of a leveling up when the DHCI nursing director received an advanced starting salary.

The Appellant, Ms. Cheryl Hollis, who was sworn, testified she is the nursing director at the Stockley Center, and was hired at an advanced salary. Finding nursing directors throughout the State has been difficult. She has been involved with requests for advanced salaries at Stockley, and is aware of other advanced salaries requested or granted for other nursing director positions.

Ms. Hollis opined the leadership and administrative roles of nursing directors are similar, despite different populations or facilities. The Stockley Center is a 115-bed intermediate care facility for the mentally retarded and also has a small assisted living facility for which she is the

administrator. Some Stockley patients also have psychiatric issues and she has experience with psychiatric medications.

Adrienne Randolph Abner, who was sworn, testified on behalf of the Grievants. She is a registered nurse, and has been a nurse for approximately 26 years. She has a Bachelors of Science, a Masters of Science in nursing – clinical specialist in med surg nursing, adult health and illness, with a minor in curriculum development, and a Masters of Business Administration (manufacturing), certification in nursing administration from the American Nurses Credentialing Center, and a legal nurse consulting background.

Ms. Abner reviewed, at Mr. Shields' request, various documents concerning the DPC nursing director postings from 2001 and 2002. Relying upon the facts that Ms. LaPaix holds a Bachelors of Science in public health community education, a Masters of Science in nursing with a major in hospital administration, and a Masters of Business Administration, she concluded Ms. LaPaix' credentials were not superior to other applicants and, in some aspects, her qualifications were less than the others. She based this conclusion upon the State's posting for the nursing director position which indicated a Bachelors of Science in nursing, yet Ms. LaPaix did not hold this degree. Ms. LaPaix' entry level into nursing was at an Associate degree, meaning she lacked some skills that a nurse with a Bachelors of Science in nursing would possess under the standards of the American Nurses Association.

Ms. Abner testified Ms. LaPaix also had no advanced clinical psychiatric skills, and thereby did not meet the minimum requirements of the posting and was not comparable with the other candidates for the DPC nursing director position. A Bachelors of Science in nursing requires more than 1 semester of psychiatric care nursing; however, Ms. LaPaix' Bachelors of Science in public community health was not the same as a Bachelors of Science in nursing. A nursing director candidate would need advanced special skills to lead a department of nursing to meet the standards of care for DPC's population. Some of the other candidates had additional certification in psychiatric nursing, which is significant because it provides advanced skills in psychotherapy, self-monitoring, and pharmacology.

Ms. LaPaix did not have any hands-on, clinical psychiatric experience. Ms. Abner testified that a Director of Nursing for a psychiatric facility would act as a floor nursing

supervisor or an on-call administrator, and therefore would need personal knowledge and experience in handling a psychiatric crisis to properly direct a group of nurses. The other candidates had hands-on psychiatric nursing, progressive managerial skills, and supervisory skills; Ms. LaPaix's 4 years of pure psychiatric experience was at the level of clinical services director, which was 2 levels removed from directing nurses. Ms. Abner testified that, under the qualifications of the 2002 posting, a maternal child nurse could have applied for and received the position; however, hiring such a person would not be appropriate because the skill needed for the position and the skills actually possessed differed.

Ms. Abner testified that Ms. LaPaix was a director at a medical facility in clinical, not psychiatric, services. Ms. Abner explained the qualifications of the DPC position called for an advanced practice nurse practitioner, which is a clinical psychiatric or clinical specialty Masters of Science in nursing; Ms. LaPaix' Masters was in nursing administration. Without knowing the courses and curriculum taken by Ms. LaPaix for her Masters of Science, it was not possible to determine whether or not her Masters met the requirement of having a Masters degree in psychiatric or mental health nursing. It was customary to see proof or evidence to support claims concerning specific experience or qualifications, but no transcripts were provided concerning Ms. LaPaix.

Additionally, Ms. Abner testified that the posting for the DPC nursing director position in 2001 required a psychiatric nursing background as a minimum qualification; however, the posting in 2002 required no psychiatric nursing. Ms. Abner interpreted that the reduced qualifications indicated a difficulty in recruiting candidates, and also believed having only ten people express an interest out of 142 people contacted and only 2 candidates (State Exhibit No. A-6) pointed to recruitment difficulties for the DPC nursing director position.

On cross-examination, Ms. Abner testified she does not have a background in psychiatric nursing. She acknowledged that the recruitment difficulties could be due to lower salary or the geographic location of the position. In reviewing State Exhibit No. A-6, Ms. Abner testified Ms. LaPaix had two years' experience in acute care clinical management, followed by experience as a director of a larger facility for a wide variety of clinical services.

On re-direct examination, Ms. Abner testified Ms. LaPaix' experience at Bergen was not 100% behavioral as various departments reported to her.

In response to questions from the Board, Ms. Abner testified it is difficult finding nursing directors across the board and opined it is equally difficult in psychiatric nursing versus cardiovascular and geriatric nursing. In comparing the qualifications of the Grievants to Ms. LaPaix, Ms. Abner concluded the Grievants had more clinical psychiatric and long term credentials and more years in nursing. Ms. Abner testified that the same administration skills needed for an 80-bed facility would be needed for a 323-bed facility; the operations aspect would not change, regardless of patient volume size. Ms. Abner was not aware of Bergen being a 323-bed psychiatric facility. Ms. Abner testified it is the search firm that ensures potential candidates meet the minimum qualifications set by the hiring agency, but ultimately the hiring agency is responsible for this.

Mary Beth Gzym, after being sworn, testified she is the Director of Human Resources at DHSS. Ms. Gzym was familiar that there was a posting for the DPC nursing director position in 2001. DHSS had limited success in obtaining people to interview for a second posting, which resulted in utilizing a search firm. The issue was serious as there was a likelihood the State was going to lose a significant amount of critical funding.

DHSS' Human Resources ("HR") was informed that Ms. LaPaix was the candidate DHSS wanted to hire at an advanced starting salary because she possessed a high degree of management experience needed to run DPC and had refused to accept the position at a salary less than \$88,150. In reviewing State Exhibit Nos. 15 and 16, Ms. Gzym testified they used Merit Rule 5.0711, which provides the ability to request an advanced salary if an applicant's qualifications clearly exceed minimum requirements. If there is a request for leveling up, DHSS is required to include that information in the request along with a cost analysis.

Ms. Gzym was familiar with the level up request concerning the advance salary for DHCI's nursing director (Grievants' Exhibit No. B-15), which she believed differed from the request concerning the advance salary for Ms. LaPaix as DPC's nursing director. Ms. Gzym testified DPC is a larger facility with a larger nurse staff and larger patient population compared to Governor Bacon Health Center. A nursing director was hired for the Delaware Hospital for

the Chronically Ill ("DHCI"), which is the State's second largest facility in the state nursing home environment. DHCI is similar to the other 2 nursing homes, Governor Bacon and Emily Bissell, which are much smaller. There were only 3 qualified applicants for the DHCI position. DHSS believed that approving that level up request was appropriate. Leveling up the salaries of the 4 nursing directors was approximately \$26,000, which DHSS could afford to do. The level up request concerning the DHCI position brought all nursing directors to a new equal salary, except Ms. LaPaix's salary was higher. Ms. LaPaix was replaced with an internal candidate from DPC who is currently paid the same salary as the other nursing directors; one nursing director who is less qualified is currently paid less.

On cross-examination, Ms. Gzym testified she does not have a nursing background. DHSS considered Ms. LaPaix qualified as evidenced by the request for an advanced salary. Ms. Gzym testified the request for leveling up salary concerning the DHCI position was based upon Rule 5.0712, which cites recruiting difficulty. She explained that while there may be a critical shortage, at times an applicant may be so well qualified that the hiring is strictly based upon advanced qualifications and the critical shortage does not apply. There was a statewide recruiting problem for nursing directors in 2003, when the DHCI and DPC positions were filled. Ms. Gzym acknowledged the request for Ms. LaPaix' advanced salary (State Exhibit No. A-16) indicated LaPaix' qualifications as well as the facts that DPC's position had been vacant for over a year and DPC's hardship was due to recruitment difficulties.

In response to questions from the Board, Ms. Gzym testified that all but one of the nursing directors presently have the same salary of \$80,481, which includes DPC. The individual who replaced Ms. LaPaix as nursing director at DPC has qualifications different than LaPaix.

FINDINGS OF FACT

The Board finds that the process for a request to level up the Appellants' salaries was not followed by the Agency, as it did not forward the request for consideration by the Director of the State Personnel Office, the Budget Director and the Controller General as contemplated by Merit Rule No. 5.0712. The position of the Agency was that the nursing director candidate for the Delaware Psychiatric Center ("DPC"), Ms. LaPaix, was hired because of superior qualifications

under Merit Rule No. 5.0711 and leveling up was not applicable. The DPC nursing director position had been vacant for at least 1 year. DPC was experiencing staffing and regulatory difficulties at the time, and undergoing surveillance for regulatory compliance. There was a likelihood the State was going to lose critical funding because of the difficulties with DPC. The Agency was seeking a nursing director for DPC with various qualities, including inpatient psychiatric experience. The Agency thought an advanced starting salary for 120% of midpoint of paygrade 21 was justified by Ms. LaPaix' educational credentials and apparent experience. The Agency did not have supporting evidence of Ms. LaPaix' experience or qualifications, including educational transcripts or course curricula. The Agency's conclusion was based, in part, upon its belief that Ms. LaPaix' position at Bergen Regional Medical Center ("Bergen") was at a 323 bed psychiatric facility. Evidence presented indicated Bergen consisted of psychiatric as well as medical, acute care and pediatric beds. The Agency requested an advanced starting salary, dated January 10, 2003, that noted Ms. LaPaix' qualifications and experience, including her recent work at Bergen as a large, state-run psychiatric hospital, and also noted the recruitment difficulties for and vacancy of the DPC nursing director position.

The Board finds that Ms. Abner, who has been a nurse for approximately 26 years, provided well-reasoned testimony concerning her conclusions as to Ms. LaPaix' education and work experience. Ms. Abner provided unrefuted testimony concerning Ms. LaPaix' background, educational credentials and work experience. Specifically, the unrefuted evidence shows that Ms. LaPaix has a Bachelors of Science degree in public and community health, which is not comparable to a Bachelors of Science in nursing. Ms. LaPaix' undergraduate degree was an entry level into nursing and at the Associate degree level, which is less than a Bachelor of Science in nursing. Unrefuted evidence also shows that Ms. LaPaix' psychiatric experience was at a level of clinical services director, which was two levels removed from directing nurses on the floors. The Board finds Ms. Abner and her testimony convincing.

The Board further finds the Agency's failure to follow the procedure in considering the request for leveling up was arbitrary and capricious, because the Agency's decision was based on the false factual premise that Ms. LaPaix had qualifications superior to those she was shown to have on closer review. The Board's decision here is not to say that leveling up is granted or

warranted, but only that the request for leveling up should have been processed in accordance with Merit Rule 5.0712. Failure to request leveling up based upon erroneous assumptions was arbitrary and capricious.

DISCUSSION

Under the former Merit Rules, there is no requirement that salaries of qualified incumbents in the same classification must have their salaries leveled up to the rate of pay of a new hire where there is a hiring to fill a position for which there is a critical shortage of applicants.

Former Merit Rule No. 5.0712 provides for a discretionary process whereby it is possible for an agency to level up the salaries of certain similarly situated employees in the same geographical area under certain circumstances. It is clearly a discretionary activity and requires a series of approvals for implementation. First, the agency must make a preliminary determination to seek leveling up, and identify which of its employees qualify. Second, the agency must then institute and forward a request to the Director of State Personnel who must approve or disapprove the request. If the Director, in the exercise of his or her discretion, approves the request, then it moves forward to the Budget Director and the Controller General, all three of whom must concur with the request for it to become effective. The testimony in this case by the Agency did not establish that it made a preliminary determination to seek leveling up. Rather, the Agency concluded that leveling up was not applicable because the advanced starting salary was based upon the assumption of superior qualifications, an assumption that, after hearing the testimony and evidence presented, was determined to be unfounded and failed to support the Agency's reasoning for its denial of the request. This is a fundamental unfairness with the Agency's position. While the Board acknowledges the Agency has discretion concerning requests for leveling up, the Agency's discretion should be exercised based upon accurate facts. The Board also acknowledges and finds that the "trio" consisting of the Director of the State Personnel Office, the Controller General, and the Budget Director, under Merit Rule 5.0712 have discretion to either approve or not approve this request, and notes that the reasons for any approval or disapproval should be set forth.

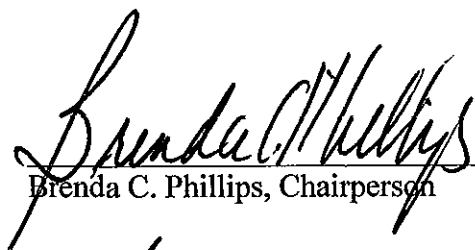
In this case, the Appellants have presented sufficient evidence to justify the Board's

finding that the reasons proffered by the Agency to approve an advanced starting salary for the DPC nursing position without following the process for the Appellants' request to be leveled up was based upon inaccurate facts, constitutes an abuse of discretion, and therefore the grievance is upheld.

ORDER

It is this 26th day of April, 2006, the Decision and Order of the Board that the Grievants' request to process consideration of their request to be leveled up be forwarded to the trio consisting of the Director of Human Resource Management,³ the Budget Director and the Controller General, for their approval or denial of the request in accordance with Merit Rules 5.0711 and 5.0712.

BY ORDER OF THE BOARD:


Brenda C. Phillips, Chairperson

N/A
Bernice M. Edwards, Member⁴


John F. Schmutz, Member


Paul R. Houck, Member

³ The Director of Human Resource Management within the Office of Management and Budget is in lieu of the State Personnel Director position which no longer exists.

⁴ Ms. Edwards recused herself as a Board member from this hearing.

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: April 26, 2006
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Distribution:

Original: File

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